(3)

No. 06-913

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IN THE

# Supreme Court of the United States

DONNA ADAMS-HEDRICK, *et vir.*,

*Petitioners,*

*v.*

LIBERTY MUTUAL INSURANCE COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Petitioners appealed the District Court's Order of Remand and Order granting attorney's fees to Liberty Mutual and sanctioning Petitioners. They further appeal the Fifth Circuit's dismissal for lack of jurisdiction based on 28 U.S.C. § 1447(d), *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 150-153 (1908) and *Sitton v. United States*, 413 F.2d 1386, 1389 (5th Cir. 1969), affirming of the non-monetary and monetary sanctions and award of statutory attorney's fees against Petitioners, and granting of costs and damages to Liberty Mutual pursuant to Fed. R. App. Proc. 38 and 28 U.S.C. § 1912. Petitioners attempt to interject non-existent constitutional issues of a right to be represented in court by a non-attorney having no basis in Liberty Mutual's original petition for judicial review of a final workers' compensation administrative decision filed in the Texas state court. The only questions for review are:

1. Whether an Order of a District Court remanding on the basis of 28 U.S.C. § 1447(c) is reviewable by the Court of Appeals.

2. Whether the District Court abused its discretion in awarding statutory attorney's fees and sanctions against the Petitioners.

3. Whether the Court of Appeals abused its discretion in awarding costs and damages against the Petitioners.

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Liberty Mutual Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| COUNTERSTATEMENT OF THE QUESTIONS PRESENTED | i |
| STATEMENT PURSUANT TO RULE 29.6 | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF CITED AUTHORITIES | vi |
| JURISDICTION | 1 |
| SUMMARY OF REASONS TO DENY PETITION | 1 |
| STATEMENT OF THE CASE | 2 |
| A. Nature of the case | 2 |
| B. Proceedings below | 3 |
| 1. Ms. Adams' work related injuries and workers' compensation claims | 3 |
| 2. Federal court litigation history | 5 |
| 3. This lawsuit | 7 |
| REASONS FOR DENYING THE PETITION | 10 |
| I. Appellate review of remand orders is barred by 28 U.S.C. § 1447(d). | 10 |

*Contents*

*Page*

A. Alternatively, without waiving the foregoing, Petitioners did not follow the proper procedure to remove this case. .. 11

1. Petitioners' Notice of Removal was untimely filed ..... 11

2. Respondent's Motion for Remand was timely filed ..... 14

3. Petitioners' Notice of Removal based upon their own cause of action ... 14

4. Petitioners attempted to remove abated state court case ..... 15

B. Lack of jurisdiction ..... 15

II. There was no abuse of discretion in awarding or affirming the award of statutory attorney's fees to Liberty Mutual the prevailing party in a removal action and sanctioning the Petitioners because such an award is authorized by 28 U.S.C. § 1447(c) when there is no objectively reasonable basis for seeking removal and Petitioners violated Rule 11 of the Federal Rules of Civil Procedure. ..... 17

A. Attorney's Fees ..... 17

B. Sanctions ..... 19

1. Non-monetary sanctions ..... 21

2. Monetary sanctions ..... 24

*Cited Authorities*

*Page*

III. The Court of Appeals for the Fifth Circuit did not abuse its discretion in awarding Liberty Mutual costs and damages for attorney's fees because the Petitioners lacked an objectively reasonable basis for seeking removal and their appeal was frivolous and caused unnecessary delay and expense. Fed. R. App. Proc. 38. . . . 15

A. Lack of objectively reasonable basis . . 25

B. Petitioners' appeal was frivolous. . . . . 25

CONCLUSION . . . . . 26

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Ankrom v. Dallas Cowboys Football Club, Ltd.*, 900 S.W.2d 75 (Tex. App.-Dallas 1995, *writ denied*) ..... 4

*Baron v. Strassner*, 7 F. Supp. 871 (S.D. Houston 1998) ..... 16

*Blackmore v. Rock-Tenn Co.*, 756 F. Supp. 288 (N.D. Tex. 1991) ..... 15-16

*Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986) ..... 13

*Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) ..... 23

*Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) ..... 16

*Certain Underwriters at Lloyd's v. Bristol-Myers Squibb Co.*, 51 F. Supp. 2d 756 (E.D. Tex. 1999) ..... 15

*Cervantes v. Tyson Foods, Inc.*, 130 S.W.3d 152 (Tex. Civ. App.—El Paso 2003) ..... 4

*Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) ... 22

*Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) ..... 19-20, 21

*Cited Authorities*


| | Page |
|---|---|
| *Denton v. Hernandez*, 504 U.S. 25, 112 S. Ct. 1728 (1992) | 25 |
| *ESIS, Inc., Servicing Contractor v. Johnson*, 908 S.W.2d 554 (Tex. Civ. App.—Fort Worth 1995) | 17 |
| *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) | 16 |
| *Galloway v. Louisiana*, 817 F.2d 1154 (5th Cir. 1987) | 21 |
| *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977) | 10 |
| *Gully v. National Bank*, 29 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936) | 16 |
| *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) | 18, 19 |
| *Kircher v. Putnam Funds Trust*, 546 U.S. __, 126 S. Ct. 2145 (2006) | 10, 11 |
| *In re Louisiana-Pacific Corp.*, 112 S.W.3d at 188 | 4 |
| *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908) | 10 |
| *Lumbermens Mut. Cas. Co. v. Garza*, 777 S.W.2d 198 (Tex. Civ. App.—Corpus Christi 1989) | 15 |

*Cited Authorities*

*Page*

*Martin v. Franklin Capital Corporation*, 546 U.S. 132, 126 S. Ct. 704 (2005) ..... 18

*Mason City & Fort Dodge Railroad Co. v. Boynton*, 204 U.S. 570, 27 S. Ct. 321 (1907) ..... 15

*Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827 (1989) ..... 24, 25

*Scott v. Communications Services, Inc.*, 762 F. Supp. 147 (S.D. Tex. 1991), *aff'd*, 961 F.2d 1571 (5th Cir. 1992) ..... 15

*Simpson v. State*, 998 S.W.2d 304 (Tex. Civ. App.—Austin 1999) ..... 17

*Thermtron Products, Inc. v. Hermandsdorfer*, 423 U.S. 336 (1976) ..... 10

*Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) ..... 10

*Thomas v. Capital Security Services, Inc.* 836 F.2d 866 (5th Cir. 1988) ..... 23

*Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988) ..... 13

*Willy v. Coastal Corp.*, 503 U.S. 131 (1992) ..... 12, 21

*Cited Authorities*

*Page*

**Statutes:**

18 U.S.C. § 24 ..... 7

18 U.S.C. § 241 ..... 7, 24

18 U.S.C. § 242 ..... 7, 24

18 U.S.C. § 371 ..... 7, 24

18 U.S.C. § 1035 ..... 7

18 U.S.C. § 1347 ..... 7

18 U.S.C. § 1512 ..... 7, 24

28 U.S.C. § 1445(c) ..... 15, 25

28 U.S.C. § 1446 ..... 1

28 U.S.C. § 1447 ..... 1

28 U.S.C. § 1446(a) ..... 11, 14

28 U.S.C. § 1447(b) ..... 11, 12, 13

28 U.S.C. § 1447(c) ..... 11, 17

28 U.S.C. § 1447(d) ..... 1, 10, 25, 26

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. § 1981 ..... 7

*Cited Authorities*


| | *Page* |
|---|---|
| 42 U.S.C. § 1983 | 7 |
| 42 U.S.C. § 1985 | 7 |
| Tex. Gov't Code § 81.102(a) | 9 |
| 28 Tex. Admin. Code § 150.3(a)(3) | 4, 9 |
| Tex. Lab. Code § 401.011(37) | 9 |
| Tex. Lab. Code § 402.001 | 3 |
| Tex. Lab. Code § 402.061 | 3 |
| Texas Lab. Code § 402.071 | 9 |
| Tex. Lab. Code § 405.001(a) | 17, 25 |
| Tex. Lab. Code Ann. § 410.104 | 4 |
| Tex. Lab. Code Ann. §§ 410.151-410.169 | 4 |
| Tex. Lab. Code Ann. § 410.169 | 17 |
| Tex. Lab. Code Ann. §§ 410.201-410.208 | 4 |
| Tex. Lab. Code Ann. §§ 410.251- 410.308 | 4 |
| Tex. Lab. Code Ann. §§ 410.024, 410.169, 410.205 | 4 |
| Tex. Lab. Code § 410.252(b)(1) | 4 |

*Cited Authorities*

*Page*

**Rules:**

Fed. R. App. Proc. 38 ..... 2, 25

Fed. R. Civ. Proc. 11 ..... 19

Fed. R. Civ. P. 11(b)(2) ..... 22

Fed. R. Civ. P. 11(c)(2) ..... 23

Fed. R. Civ. Proc. 54(d)(2) ..... 17

## JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Order dismissing Adams' and Hedrick's *pro se* appeal to that court on September 15, 2006. On November 16, 2006, Adams and Hedrick, *pro se*, initially filed their Petition for Writ of Certiorari and it was docketed on or about January 6, 2007. Respondent respectfully submits that this Court lacks and the Fifth Circuit Court of Appeals lacked jurisdiction to review the District Court's Order of Remand granted on the basis of a timely raised defect in removal or lack of subject matter jurisdiction, pursuant to 28 U.S.C. §§ 1446 & 1447, and should dismiss the petition as to those questions. Respondent further submits that this Court does have jurisdiction to review the District Court's order granting Liberty Mutual's statutory attorney's fees and sanctioning Petitioners and the orders of the Court of Appeal for the Fifth Circuit affirming the District Court's order on attorney's fees and sanctions and granting the Respondent's motion for costs and damages, all pursuant to 28 U.S.C. § 1254(1).

## SUMMARY OF REASONS TO DENY PETITION

I. Pursuant to 28 U.S.C. § 1447(d), the United States Court of Appeals for the Fifth Circuit did not have jurisdiction to review a dismissal of an appeal of an Order of Remand based upon defects in the removal procedure or lack of jurisdiction, even if erroneously granted.

A. Alternatively, without waiving the foregoing, Petitioners did not follow the proper procedure to remove this case from state court to District Court.

B. Alternatively, without waiving the foregoing, the District Court had no jurisdiction of this case.

II. The District Court did not abuse its discretion in awarding statutory attorney's fees to Liberty Mutual and granting monetary and non-monetary sanctions against Petitioners, and the Court of Appeals for the Fifth Circuit did not abuse its discretion in affirming same, because Petitioners lacked an objectively reasonable basis for seeking removal, Petitioners' conduct during the course of this case up to July 25, 2005, violated Rule 11 of the Federal Rules of Civil Procedure and Liberty Mutual was the prevailing party in the case.

III. The Court of Appeals for the Fifth Circuit did not abuse its discretion in awarding Liberty Mutual costs and damages because Petitioners lacked an objectively reasonable basis for seeking removal, their appeal is frivolous and has caused unnecessary delay and expense. Fed. R. App. Proc. 38.

## STATEMENT OF THE CASE

### A. Nature of the case

This is an appeal of the dismissal of an appeal of an order of remand in a state workers' compensation case. Respondent submits that the only issue for review is whether a remand order of a workers' compensation case, defectively removed from state court and over which the federal district court had no jurisdiction, is reviewable. Alternatively, and without waiving the foregoing, at issue is whether Petitioners properly removed this case from state court and whether the District Court had jurisdiction to hear this case.

Additionally, issues raised, but not briefed by Petitioners, are whether the Court of Appeals for the Fifth Circuit abused its discretion in granting Liberty Mutual its costs and damages and whether the District Court abused its discretion in granting Liberty Mutual statutory attorney's fees and in sanctioning the Petitioners.

## B. Proceedings below

This case originated as a suit filed in state district court by Respondent Liberty Mutual for judicial review of an administrative decision of the Texas Workers' Compensation Commission Appeals Panel by which it was aggrieved with respect to the workers' compensation claim of Donna Adams. Adams answered and counterclaimed for bad faith and Hedrick intervened. The bad faith claim was severed and abated.

### 1. Ms. Adams' work related injuries and workers' compensation claims

Ms. Adams was employed by IBM as a technical support representative responsible for going to work sites and setting up computer systems. Ms. Adams filed two workers' compensation claims with the Texas Workers' Compensation Commission[1] (TWCC), the Texas agency charged with the responsibility of administering workers' compensation claims at the time, Tex. Lab. Code § 402.061, (R. 322): one for March 29, 2000 claiming to have suffered an asthma attack after inhaling dust at the jobsite that was still under construction and one for August 17, 2000, claiming another asthma attack as a result of the heat, which resulted in her hospitalization.[2]

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1. By recent amendment effective September 1, 2005, the Texas Workers' Compensation Commission was abolished and supplanted by the Division of Workers' Compensation within the Texas Department of Insurance. Tex. Lab Code § 402.001. For purposes of this brief, this agency will be referred to as the TWCC.

2. During the pendency of these claims, Ms. Adams and Mr. Hedrick filed suit against the TWCC, hearing officer Kathleen Decker, Liberty Mutual, its counsel Tommy Smith, IBM, its chief executive officer at the time, Louis Gerstner and its employee Michael Clark (Cause No. H-01-3416). (R. 356) The case was dismissed for lack of jurisdiction by Judge Hoyt. (R.468-472) Ms. Adams and Mr. Hedrick (Cont'd)

Ms. Adams' workers' compensation claims proceeded and were heard in one contested case hearing. (Pet. App. G) Ms. Adams appeared at the contested case hearing and was represented by her husband, Mr. Hedrick.[3] (Pet. App. G) (R. 322) The hearing officer's findings and decision were affirmed by the Appeals Panel.[4] On August 21, 2003, Liberty Mutual filed a suit for judicial review of a portion of the hearing officer's decision to state court under Cause No. 25628 in Brazoria County, Texas, the county of residence of Ms. Adams pursuant to the Texas Labor Code. Tex. Lab. Code § 410.252(b)(1). (R.334-348) Ms. Adams did not appeal the TWCC finding that she did not sustain a compensable injury on August 17, 2000 and this finding became final. Tex. Lab. Code § 410.205. On September 26, 2003, she answered the lawsuit and filed a counterclaim for bad faith. (R.706)

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(Cont'd)
appealed to the Court of Appeals for the Fifth Circuit under Case No. 02-20111 and the order of dismissal was affirmed because Ms. Adams failed to exhaust her administrative remedies.

3. Texas allows a non-attorney to represent a claimant before the TWCC. 28 Tex. Admin. Code § 150.3(a)(3).

4. "Judicial review is the concluding step of the Act's four-tier system for disposition of compensation issues. *In re Louisiana-Pacific Corp.*, 112 S.W.3d at 188; *see* Tex. Lab. Code Ann. §§ 410.021-410.034 (benefit review conference); Tex. Lab. Code Ann. §§ 410.104; 410.151-410.169 (arbitration or contested case hearing); Tex. Lab. Code Ann. §§ 410.201-410.208 (appeals panel review); Tex. Lab. Code Ann. §§ 410.251- 410.308 (judicial review). Each step is a prerequisite to the succeeding one. *See* Tex. Lab. Code Ann. §§ 410.024, 410.169, 410.205; *see also Ankrom v. Dallas Cowboys Football Club, Ltd.*, 900 S.W.2d 75, 78 (Tex. App.-Dallas 1995, *writ denied)* (Act provisions regarding successive steps in the progress and maturity of a claim are mandatory.)." *Cervantes v. Tyson Foods, Inc.*, 130 S.W.3d 152 (Tex. Civ. App.—El Paso 2003).

Ms. Adams also filed motions to allow her husband Mr. Hedrick to represent her. (R.566-575) Mr. Hedrick intervened in the lawsuit and made himself a party. (R.576-581) Liberty Mutual filed a motion to sever the bad faith claim and specially excepted to the pleadings seeking recognition of Mr. Hedrick as Ms. Adams' attorney for purposes of the litigation.

Liberty Mutual's motion for severance was set for hearing with proper notice to Petitioners. Ms. Adams and Mr. Hedrick failed to appear at the hearing on January 26, 2004. At the conclusion of the hearing held in open court, the motion for severance was granted and Petitioners' bad faith claims were severed from the main case into Cause No. 25628-1. (Pet. App. F) (R.350-353) Liberty Mutual's special exceptions have not yet been heard because they are part of the severed and abated case. (R.154)

**2. Federal court litigation history**

The removal actions filed by Ms. Adams and Mr. Hedrick in this case are:

| | Federal Docket No. | Date Filed | State Cause Remanded | Date of Remand | Judge Presiding |
|---|---|---|---|---|---|
| 1. | H-04-0954 | 3/10/04 | No. 25628 | 10/22/04 | Hon. Lee Rosenthal |
| 2. | H-05-0987 | 3/23/05 | No. 25628 | 5/6/05 | Hon. Lynn Hughes |
| 3. | H-05-1974 | 6/6/05 | No. 25628-1 | 7/25/05 | Hon. Kenneth Hoyt |

Both prior removals were of the main case (Cause No. 25628), the appeal of the final decision of the Texas Workers' Compensation Commission Decision and Order. In the first removal action, no motion for statutory fees was filed, in the second action one was filed and denied.[5]

### 3. This lawsuit

This case involves removal of the abated and severed bad faith counterclaims of Petitioners who alleged that "This case became removable on May 24, 2005 upon the United States District Courts [sic] issuing its last order; Order Denying Liberty Mutual Insurance Company's Motion for Sanctions and Attorney Fees in removed case No. H-05-987." (R. 607) Further into the Notice of Removal, they alleged that they were removing

> . . . all **'bad faith actions' and violation of U.S.C. Title 18** (aka The United States Criminal Code) against LIBERTY MUTUAL INSURANCE COMPANY and their 'insured employer' International Business Machines contained in the 239th Judicial Court of Brazoria County, Case No. 25628-1 alleging civil and criminal wrongs not compensable under the Texas Workers' Compensation Act.

(R. 622-623) Petitioners attempted to assert numerous federal questions involving 18 U.S.C. §§ 24, 241, 242, 371, 1035, 1347, 1512, and 42 U.S.C. §§ 1981, 1983 and 1985, that have nothing to do with Liberty Mutual's suit for judicial review of a workers' compensation administrative ruling.

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5. The motion was filed to put the *pro se* Petitioners on notice that Liberty Mutual could request such relief from, and as a deterrent to, their frivolous and repetitive removals.

As the bad faith claims were severed on January 26, 2004, Liberty Mutual filed its Motion to Remand based on defects in the statutory removal procedure: the May 24, 2005 Order denying attorney's fees did not create federal jurisdiction, Petitioners did not file their notice of removal within 30 days of the Order of Severance, but instead more than one year after the Order of Severance and the District Court lacked jurisdiction over a state workers' compensation case. (R 526-531)

Liberty Mutual's Motion to Remand was set for hearing with proper notice to Ms. Adams and Mr. Hedrick, but neither appeared at the hearing on July 25, 2005. (Pet. App. D) (R. 875) During the hearing, Judge Hoyt attempted to reach the Petitioners by phone. (Pet. App. D) (R. 1006) At the conclusion of the short hearing, Judge Hoyt granted the Liberty Mutual's Motion to Remand and Motion for Sanctions and Motion for Statutory Attorney's Fees and denied all the motions filed by Petitioners. (Pet. App. B) (R. 1009, 962-966 & 968) Petitioners appealed all orders to the Fifth Circuit.[6] The basis of their appeal was that (1) the state district court violated Ms. Adams constitutionally guaranteed right to be properly represented in court, (2) the District court violated Mr. Hedrick's constitutional right to represent his wife in court, (3) the District and state district courts violated Ms. Adams' right to access to court by failing to allow her spouse Mr. Hedrick

6. Order of Remand of July 25, 2005, the Order Granting Liberty Mutual's Motion for Sanctions and Motion for Statutory Attorney's Fees and the Order denying the numerous motions to compel joinder of Attorney General of United States, the United States Department of Justice, International Business Machines (IBM), Louis V. Gerstner (then acting CEO of IBM), Richard Rodgers, Ellen O'Brien, Bradley Koehl, Dr. Ponterio and Michael Clark, and Motion to Appoint Guardian, Motion to Disqualify Opposing Counsel, Motion to Strike All Documents Filed by Opposing Counsel, Motion to Stay and Motion for Continuance. (R. 977-978)

to represent her in court, (4) the District court denied Ms. Adams' right to access to court by failing to advise her prior to any hearings that access via telephone was approved, (5) the District court erred in ordering attorney fees and sanctions against Petitioners, and (6) the District court erred in remanding the case on the basis of lack of subject matter jurisdiction. Liberty Mutual filed a Motion to Dismiss the appeal as well as an Appellee's Brief. The Fifth Circuit granted Liberty Mutual's Motion to Dismiss and Motion for Costs and Damages, and denied all Petitioner's motions.[7]

On November 16, 2006, Petitioners filed their Petition for Writ of Certiorari with the Supreme Court. The inaccuracies contained in the rendition of the facts made by Petitioners and the petition's focus on a non-existent right of Hedrick, a layman, to represent Adams in a court of law required Liberty Mutual to file this Brief in Opposition. Petitioners filed their Petition for Writ of Certiorari asserting federal questions involving (1) whether the disabled Ms. Adams' right to due process was violated by failing to recognize the status of her spouse Mr. Hedrick to represent her in court, (2) whether the provisions of Tex. Lab. Code §§ 401.011(37) & 402.071 and 28 Tex. Admin. Code § 150.3(a)(3), allowing a claimant non-attorney representation at TWCC hearings, and the provision of the Tex. Gov't Code § 81.102(a), prohibiting non-attorney representation in state and federal courts violate the due process rights of Ms. Adams to be represented by her non-attorney spouse who represented her at the administrative hearing and who was most knowledgeable of the facts of the case, (3) whether the District Court and Court of Appeals for the Fifth Circuit abused their discretion in ordering sanctions and costs against

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7. Petitioners' motion for $20,000 in sanctions, motion to turn the appeal over to the FBI for investigation of allegations of conspiracy between employees of the Court of Appeals and motion to continue all actions pending the outcome of that investigation.

Petitioners to "silence" attempts to challenge state laws and non-attorney representation, (4) whether the Court of Appeals for the Fifth Circuit erred in dismissing the appeal without addressing the disabled Ms. Adams' rights to due process, representation and protection of fair and equal access to the court, and (5) whether the District Court and the Court of Appeals for the Fifth Circuit unfairly issued sanctions and costs against Petitioners.

## REASONS FOR DENYING THE PETITION

### I. Appellate review of remand orders is barred by 28 U.S.C. § 1447(d).

Liberty Mutual's Motion to Remand, based on defects in the removal procedure and lack of jurisdiction, was heard and granted. Therefore, even if erroneous, this Court does not have jurisdiction to consider a review, by any method, of the Order of Remand. 28, U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-128 (1995); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 150-153 (1908) (plaintiff, not defendant, controls removability of case); *Kircher v. Putnam Funds Trust*, 546 U.S. __, 126 S. Ct. 2145, 2154 (2006).

Petitioners "appeal to the United States Court of Appeals for the 5th Circuit from the following orders of the United States District Court ... Order of Remand entered in this action on the 25th day of July, 2005." (R 977)

Courts of appeal lack jurisdiction to hear a direct appeal of an order of remand based on a defect in the removal procedure. 28 U.S.C.A. § 1447 (d); *Thermtron Products, Inc. v. Hermandsdorfer*, 423 U.S. 336, 346 (1976). Therefore, this appeal should be dismissed.

Even if erroneous, this Court does not have jurisdiction to consider a review, by any method, of the Order of Remand. "[R]eview is unavailable no matter how plain the legal error in ordering the remand.'" *Kircher v. Putnam Funds Trust*, 547 U.S. __, 126 S. Ct. 2145, 2154 (2006) (quoting *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977)). (Where a remand order is based on one of § 1447(c)'s grounds, review is unavailable no matter how plain the legal error in ordering the remand.)

**A. Alternatively, without waiving the foregoing, Petitioners did not follow the proper procedure to remove this case.**

**1. Petitioners' Notice of Removal was untimely filed**

In the alternative, without waiving the foregoing, Petitioners filed their Notice of Removal on June 6, 2005. (R. 8) Petitioners' Notice of Removal was untimely because they failed to file their Notice within thirty days of receipt of either the initial pleading or an amended pleading, motion, order or other paper from which the Petitioners may have first ascertained that this case was or had become removable as required by 28 U.S.C. § 1446(b). (R. 265-266).

Petitioners recited in their Notice of Appeal that this case became removable on May 24, 2005, the date Liberty Mutual's Motion for Sanctions and Attorney's Fees was denied by Judge Hughes in the second removal action of the main case, but failed to include a brief statement explaining the basis of how this order created federal jurisdiction.[8] 28 U.S.C. § 1446(a). (R. 10) Nothing in the

8. Petitioners did not attach a copy of the May 24, 2005 Order to their Notice of Removal, nor include it in their appendix. It appears in Respondent's Appendix as No. 3.

May 24th Order in the prior removal action of the main case, gave rise to a federal question for federal court jurisdiction. *See Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992). The May 24th Order was the only "pleading, motion, order or other paper" at the time of the June 6 Notice of Removal that was less than thirty days old and that Petitioners could allege to appear timely. 28 U.S.C. § 1446(b). Their statement that the case became removable on May 24, 2005, because of the May 24, 2005 Order Denying Motion for Sanctions and Attorney's Fees was a frivolous pleading to avoid the Section 1446(b)'s thirty day time limit. Such order has no bearing on whether the District Court had jurisdiction of the controversy removed in this case and in no way relates to any of the numerous statutes Petitioners allege present a federal question. (R. 10-21)

As another basis for removal to federal court, Petitioners included the January 26, 2004 state court Order of Severance and removed the "severed allegations of civil wrongs."[9] (Pet. App. F) (R 623). The January 26, 2004 state court Order of Severance and the Memorandum and Order of Judge Rosenthal in the first removal action were attached to Petitioners' Notice of Removal in the second removal action filed on March 23, 2005. (Pet. App. F,) (R.557-565) Clearly, Petitioners had notice of both orders on March 23, 2005. Therefore, from the record, March 23, 2005 is the latest date from which Petitioners could have received notice of and ascertained from those orders "that the case is one which is or has become removable". 28 U.S.C. § 1446(b). Assuming they could base removal on their own pleadings, to be timely, Petitioners must have filed their Notice of Removal by April 23, 2005. Their Notice of Removal was filed on June 6, 2005, more than thirty days after March 23.[10]

9. Petitioners used the January 26, 2004 as a ground for removal in their 2nd removal action.

10. In reality, Appellants had notice of these Orders much earlier, but verification of their receipt of them before March 23, 2005, is outside the record.

Not having filed their Notice of Removal within 30 days of the January 26, 2004 Order of Severance, or even 30 days from notice of the order, the Petitioners waived their right to do so. 28 U.S.C. § 1446(b); *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). It was incumbent upon the Petitioners to show their removal was proper. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). In their Response to the Liberty Mutual's Motion to Remand, Petitioners failed to assert, or make any showing, that their removal was timely. (R. 881-897) No facts, argument or authority were asserted by Petitioners in response to Liberty Mutual's ground of procedural defects in the removal. (R. 881-897)

The Petitioner's Notice of Removal is untimely for the additional reason that the alleged facts made the basis of the Petitioners' third removal are represented by Petitioners as having taken place prior to the filing of Liberty Mutual's original state court action. They attached to their Notice of Removal the following exhibits dated prior to the filing of Liberty Mutual's original state court action in support of their factual allegations:

> Exhibit A dated October 2, 2000 (Durable Power of Attorney signed by Donna Adams appointing Robert Hedrick her attorney in fact) (R.42);
>
> Exhibit D dated October 10, 2000 –February 26, 2001 (Notes of E. O'Brien) (R. 60);
>
> Exhibit E dated February 2, 2001 (letter from IBM to OSHA), January 26, 2001 (letter from U.S. Dept. of Labor to IBM), May 30, 2001 (Letter from IBM to Robert Hedrick) (R.62);
>
> Exhibit F purportedly dated March 27, 2003 (Purported deposition of Michael Clark) (R.71);
>
> Exhibit G dated February 3, 2001 (Affidavit of Edith Knighten) (R.77);

Exhibit Q dated May 15, 2001 (Notice of Appraised Value) (R.90); and

Exhibit Z dated May 30, 2001 (Letter from Tommy Smith to Louis Gertner) (R.160).

Therefore, in September, 2003, when they filed their answer/ counterclaim in the state district court, Petitioners had already "ascertained" the existence of most of the facts they alleged gave rise to the claims asserted in their Notice of Removal.

**2. Respondent's Motion for Remand was timely filed**

Liberty Mutual timely filed its Motion to Remand on June 30, 2005 within thirty days of Petitioners' Notice. (R. 257) Liberty Mutual's Motion to Remand was based in part on procedural defects in the Appellants' removal of the case which included failure to timely remove, failure to state a ground upon which removal could be based, having the status of a plaintiff in the action sought to be removed, trying to remove an abated lawsuit, and basing removal on their own pleadings and not Liberty Mutual's original petition. (R. 265-269)

**3. Petitioners' Notice of Removal based upon their own cause of action**

Another basis of Liberty Mutual's Motion to Remand was the defect of Petitioners' Notice of Removal being based upon their own causes of action and not Liberty Mutual's original petition. (R. 267) "In cases removed to federal court, the plaintiff's well-pleaded complaint, not the removal petition, must establish that the case arises under federal law." *Id.* at 1165.

Liberty Mutual asserted that Petitioners were in fact the "plaintiffs" in the action they sought to remove and did not qualify as "a defendant" under 28 U.S.C.A. § 1446(a) to remove

their bad faith action. (R. 267) As the plaintiffs in their cause of action, they had the choice to file their action either in state court or District court when they filed their countersuit on September 26, 2003.

In *Certain Underwriters at Lloyd's v. Bristol-Myers Squibb Co.*, 51 F. Supp. 2d 756, 759 (E.D. Tex. 1999), the issue of whether the removing party was a defendant was addressed. The factors considered were whether the party's claims constitute the "mainspring of the proceedings" and whether the "the institution and continuance of the proceedings depend upon its will," citing *Mason City & Fort Dodge Railroad Co. v. Boynton*, 204 U.S. 570, 580, 27 S. Ct. 321 (1907). Though Ms. Adams was the designated defendant in the workers compensation case, she became a plaintiff when she sued Liberty Mutual for bad faith. Since the right to removal is limited to defendants, Ms. Adams, being a plaintiff in the severed bad faith action, could not remove her case to District Court. *Scott v. Communications Services, Inc.*, 762 F. Supp. 147, 150 (S.D. Tex. 1991), *aff'd*, 961 F.2d 1571 (5th Cir. 1992).

**4. Petitioners attempted to remove abated state court case**

Liberty Mutual also asserted that by virtue of the Order of Severance and Abatement, the Cause No. 25628-1 had been abated until the main case had been finally determined. (R.268, 350-353) The case having been abated, the Petitioners were prohibited from proceeding in any manner until the case had been revived. *Lumbermens Mut. Cas. Co. v. Garza*, 777 S.W.2d 198, 199 (Tex. Civ. App.—Corpus Christi 1989).

**B. Lack of jurisdiction**

Liberty Mutual's Original Petition was based upon a workers' compensation claim filed by Ms. Adams over which federal courts have no jurisdiction. 28 U.S.C. § 1445(c); *Blackmore v. Rock-Tenn Co.*, 756 F. Supp. 288, 289 (N.D. Tex.

1991). Adams was attempting to refile the abated state court bad faith counterclaim in District Court. Liberty Mutual's Original Petition controls whether this action was removable to federal court. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L. Ed. 2d 318 (1987). Liberty Mutual did not allege a federal question on the face of its Original Petition to which federal jurisdiction could attach. *Gully v. National Bank*, 29 U.S. 109, 111-113, 57 S. Ct. 96, 97, 81 L. Ed. 70 (1936). The federal question issues alleged by Adams (complaint with the trial court's Order Granting Severance and Abatement of January 26, 2004, her spouse's right to act as an attorney for her in a court of law and her request to have him appointed guardian and/or guardian ad litem over and/or for his wife) do not grow out of the same fact situation or controversy made the basis of the original suit and do not confer subject matter jurisdiction to this federal court. *Id.*, *Baron v. Strassner*, 7 F. Supp. 871, 873 (S.D. Houston 1998).

Petitioners have and are by their Petition "challenging the actions, lack of actions and orders of the ... 239th Judicial District Court of Texas as being unconstitutional ..."[11] Even if Judge Hughes May 24, 2005 Order and Judge Sebestra's January 26, 2004 Order of Severance were final judgments, the District Court lacked jurisdiction to "review and reverse unfavorable state-court judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

The Petitioners added a personal injury action arising out of the alleged on-the-job injury of August 17, 2000. Ms. Adams' claim for benefits arising out of the August 17, 2000 occurrence was presented to and considered by the TWCC. (R.322) The hearing officer held that Ms. Adams did not sustain a compensable injury on August 17, 2000. (R. 328) Ms. Adams did not file an appeal of this issue. Therefore, the finding that

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11. Petition for Writ of Certiorari, Page 3.

Ms. Adams did not sustain a compensable injury on August 17, 2000 is a final determination of that issue. Tex. Lab. Code § 410.169, *ESIS, Inc., Servicing Contractor v. Johnson*, 908 S.W.2d 554, 562-563 (Tex. Civ. App.—Fort Worth 1995). Ms. Adams' exclusive remedy against her employer and its workers' compensation carrier for the August 17, 2000 occurrence was the recovery of workers' compensation benefits. Tex. Lab. Code § 405.001(a). She is precluded from bringing a personal injury action against Liberty Mutual or its insured based upon the August 17, 2000 occurrence. Tex. Lab. Code § 405.001(a), *Simpson v. State*, 998 S.W.2d 304, 306 (Tex. Civ. App.—Austin 1999).

## II. There was no abuse of discretion in awarding or affirming the award of statutory attorney's fees to Liberty Mutual the prevailing party in a removal action and sanctioning the Petitioners because such an award is authorized by 28 U.S.C. § 1447(c) when there is no objectively reasonable basis for seeking removal and Petitioners violated Rule 11 of the Federal Rules of Civil Procedure.

### A. Attorney's fees

An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. 28 U.S.C.A. § 1447(c). The District Court is empowered to award reasonable attorney's fees to successful litigants seeking remand of cases to state court. *Id.*, Fed. R. Civ. Proc. 54(d)(2). By filing its Motion to Remand, Motion to Dismiss Pursuant to Rule 12(b), Motion to Dismiss for Lack of Subject Matter Jurisdiction and Plea to the Jurisdiction on June 30, 2005, within thirty (30) days of receiving on June 9, 2005, Petitioner's June 6, 2005 Notice of Removal, and by being the prevailing party in such removal action, LIBERTY MUTUAL qualified for an award of statutory attorney's fees. 28 U.S.C. § 1447(c). By filing its Motion for

Sanctions and Statutory Attorney's Fees with a supporting affidavit from the undersigned attorney contemporaneously with its motion to dismiss and remand, Liberty Mutual met its burden to show there is no objectively reasonable basis for the Petitioners' third removal and the unusual circumstances present in this case. *Martin v. Franklin Capital Corporation*, 546 U.S. 132, 126 S. Ct. 704, 711 (2005).

Liberty Mutual's Motion for Sanctions and Statutory Attorney's Fees set out the repetitive removal actions that effectively delayed the state court case for almost three years from the notice of the first removal on March 4, 2004. Petitioners alleged in their June 6, 2005 (3rd) Notice of Removal that the case became removable when on May 24, 2005, an Order was signed by Judge Hughes denying Liberty Mutual's Motion for Sanctions and Statutory Attorney's Fees. Considering the circumstances and facts of this case as set out and argued above, there is no objectively reasonable basis for Petitioners to assert that Liberty Mutual's cause of action involved a federal question requiring federal jurisdiction as a result of an order denying a statutory attorney's fee request for fees in a prior removal action between the same parties. Petitioners did not proffer any non-frivolous argument or authority on this point in either the District Court, the Court of Appeals or this Court. There was no basis, either in law or fact, upon which Petitioners could have prevailed on any of their claims. The District Court found that the June 6, 2005 removal was in bad faith and without substantial justification.

As set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), the guidelines for awarding attorney's fees are:

1. Time and labor required;
2. The novelty and difficulty of the questions;
3. The skill requisite to perform the legal service properly;

4. The preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client or the circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The "undesirability" of the case;
11. The nature and length of the professional relationship with the client; and
12. Awards in similar cases. *Johnson*, 488 F.2d at 717-719.

The Order granting the statutory attorney's fees states on its face that the Court considered the guidelines set forth in *Johnson*, 488 F.2d at 717-719, and that according to such guidelines, the amount of the fee requested by Liberty Mutual was reasonable and necessary. (Pet. App. B)

Petitioners have not put forth any argument or authority to claim that the District Court erred in awarding Liberty Mutual its statutory attorney's fees. Therefore, the Court of Appeals for the Fifth Circuit did not abuse its discretion in affirming the award of $10,750.00 in attorney's fees.

**B. Sanctions**

The District Court did not abuse its discretion in sanctioning Adams and Hedrick with monetary and non-monetary sanctions because Adams' and Hedrick's conduct during the course of this case violated Rule 11 of the Federal Rules of Civil Procedure. The correct standard of review of a district court's order under Rule 11 is abuse of discretion. *Cooter & Gell v.*

*Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The central purpose of Rule 11 is to deter baseless filings[12] in district court and thus, consistent with Rule Enabling Act's grant of authority, streamline administration and procedure of federal courts. *Id.* at 393.

> 'Determining whether an attorney has violated Rule 11 involves a consideration of three types of issues. The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is "warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an "appropriate sanction."' *Id.* at 399.

By affirming the sanctions orders against Petitioners on the basis that there was no abuse of discretion, the appellate court applied the correct standard of review. *Id.* at 405.

> "[I]t is well established that a federal court may consider collateral issues after an action is no longer pending. . . . [An] imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and if so, what sanction would be appropriate." *Id.*, at 395-396, 110 S. Ct., at 2456. Such an order implicates no constitutional concern because it "does not signify a district court's assessment of the legal merits of the

12. Petitioners object to the order of monetary and non-monetary sanctions on the grounds that they are attempts to "silence the constitutional issues of the case" and unfair. (Petition for Writ of Certiorari, p. 22)

complaint." *Id.*, at 396, 110 S.Ct., at 2456. It therefore does not raise the issue of a district court adjudicating the merits of a "case or controversy" over which it lacks jurisdiction. *Willy v. Coastal Corp.*, 503 U.S. 131, 137-138 (1992).

**1. Non-monetary sanctions**

As argued before, the Petitioners' three removal actions were groundless and for delay purposes. (R. 261-264) Petitioners failed to controvert the factual allegations in Liberty Mutual's Motion to Remand (R.258-264, 881-888) Petitioners' modus operandi is to remove to federal court, file pleadings alleging conspiracy, fraud and criminal violations, request rulings without hearings, move to disqualify opposing counsel and the judge, move to strike opposing pleadings, request a stay, fail to appear at hearings and file a notice of removal alleging Ms. Adams' constitutional rights have been violated. (R. 115-120, 132-135, 136 – 141, 513-524, 540-550, 566-574, 876-880) The legal basis of their removal, based upon the May 24, 2005 Order Denying Liberty Mutual Insurance Company's Motion for Sanctions and Attorney Fees, was groundless and in bad faith. The District Court's power to decide a collateral issue of attorney's fees did not create federal question jurisdiction over Liberty Mutual's suit for judicial review. *Willy v. Coastal Corp.*, 503 U.S. at 137-138. The common denominator in all of the Petitioners' filings is a complaint of the violation of their due process with no attempt to avail themselves of the procedure in place to prevent the very same due process violation of which they complain. *Galloway v. Louisiana*, 817 F.2d 1154, 1158 (5th Cir. 1987) ("An employee cannot ignore the process duly extended to him and later complain that he was not accorded due process.").

Applying the test set forth in *Cooter & Gell*, 496 U.S. at 399, it was not an abuse of discretion for the District Court to sanction the Petitioners with monetary and non-monetary sanctions. The sanction was appropriately tailored to prevent the continued filings of groundless removal actions whose

factual contentions are clearly baseless. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51 (1991).

By signing the June 6, 2005 Notice of Removal, Petitioners certified that to the best of their knowledge, information and belief, formed after inquiry reasonable under the circumstances, that the claims and legal contentions of federal jurisdiction made in their Notice of Removal were warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Fed. R. Civ. P. 11(b)(2).

As evidenced by a comparison of the three Notices of Removal filed by Petitioners (R. 513-524, 540-550 & 605-640), the allegations are the same – violation of Ms. Adams' right to due process by not allowing her non-attorney husband to represent her and federal question based upon the state court's granting the severance of the bad faith case – but each with a new twist. The twist has ranged from allegations of not being provided with proper representation as an alternative to recognizing her husband as her attorney to allegations of conspiracy and violations of numerous federal criminal statutes that have no basis in fact or law. After two attempts to remove on basically the same grounds and two remands, it is inconceivable that the Petitioners thought that their claims in the third Notice of Removal were warranted by existing law or a non-frivolous argument.

Further, as evidenced by a comparison of the three Notices of Removal, the facts and events made the basis of this 3$^{d}$ removal were known to them at the time of the 1$^{st}$ removal. Therefore, their statement of jurisdiction based upon the May 24, 2005 Order denying sanctions is merely an attempt to plead around the untimely filing of this removal attempt. Clearly, the federal question issues and the pleading, order or paper, that they complain of (if indeed they have a legitimate complaint) is the Order of Severance and Petitioners' erroneous assertion that Hedrick, a non-attorney, may represent his wife in court.

*Pro se* litigants have the duty to investigate the factual basis of their lawsuit and are subject to the sanctions of Rule 11 for failure to do so. ***Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.***, 498 U.S. 533, 545-546, 564 (1991).

In determining whether Petitioners made reasonable inquiry into the law governing this case, the Court may be guided by *Thomas v. Capital Security Services, Inc.* 836 F.2d 866, 875-876 (5th Cir. 1988). Factors enumerated in *Thomas* include:

(1) time available to prepare the pleading

(2) plausibility of the legal argument

(3) *pro se* status of the litigant

(4) complexity of the legal and factual issues raised in the case. *Thomas* at 875-876.

LIBERTY MUTUAL asserted that (1) as there was no deadline to meet, sufficient time was available to Petitioners to prepare their pleading; (2) their legal arguments lacked any plausibility; (3) the *pro se* status of Petitioners had already been granted accommodation since they had been involved in three prior federal court proceedings and one appellate proceeding involving this workers' compensation case involving the similar issues and legal arguments on Mr. Hedrick's non-existent right to represent his wife; (4) the complexity of this case was average until the Petitioners began their course of action of removing this case to federal court; and (5) as shown above, Petitioners were prohibited from re-litigating the alleged August 17, 2000 on the job injury.

A sanction must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Fed. R. Civ. P. 11(c)(2). The sanction prohibiting Petitioners from filing any further pleadings in federal court on this litigation is specific to this case alone, does

not abridge Petitioners' right to file anything that is meritorious and non-frivolous and protects Liberty Mutual from having to defend against the Petitioners' frivolous actions.

**2. Monetary sanctions.**

It was not an abuse of discretion for the District Court to grant monetary sanctions because of the repeated removal actions. No request for fees was made in the first removal. The fee request for the second removal was denied. After the second removal, Petitioners could not argue, and have not argued, that they were unaware of the possibility that they could be ordered to pay Liberty Mutual's attorney's fees. Had Petitioners stopped after the second removal, they would not have been sanctioned.

Petitioners' claims fall into the category described by Justice Marshall in *Neitzke v. Williams* as "fantastic or delusional scenarios".[13] *Neitzke v. Williams*, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833 (1989). But for Petitioners' course of conduct, Liberty Mutual would not have incurred additional attorney's fees to defend against the frivolous removal of this case to federal court. Petitioner's pleadings were a work in progress, adding a new allegation or changing an approach to the same issue, requiring close review to avoid overlooking a hidden issue. Petitioners' pleadings, the Affidavit of Mary Markantonis (R. 314) filed with the District Court and the July 25, 2006 Order (R. 962-966) substantiate this point.

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13. Petitioners alleged numerous criminal violations including 18 U.S.C. §§ 241, 242, 371 & 1512 (R. 13-22) Petitioners alleged a conspiracy between Liberty Mutual's former attorney, Liberty Mutual and IBM "to violate civil rights and Title 18." (R. 853, 868) Petitioners sought to disqualify the undersigned counsel because she was employed by the same law firm as the former attorney. (R. 867) Petitioners alleged a conspiracy between the undersigned attorney and the Fifth Circuit court employees because Liberty Mutual's request for extension of time to file brief was addressed to a specific employee in the clerk's office instead of the court's clerk.

## III. The Court of Appeals for the Fifth Circuit did not abuse its discretion in awarding Liberty Mutual costs and damages for attorney's fees because the Petitioners lacked an objectively reasonable basis for seeking removal and their appeal was frivolous and caused unnecessary delay and expense. Fed. R. App. Proc. 38.

### A. Lack of objectively reasonable basis

Liberty Mutual incorporates all its argument and authority set forth in Sections I. and II. above regarding lack of jurisdiction, defect in the removal process and frivolous nature of this appeal in support of its assertion that there was no objectively reasonable basis for Petitioners to file the third Notice of Removal in this case. Petitioners' claims (legal representation by non-attorney husband, violations of criminal statutes, personal injuries for on the job injury found to be not compensable) are legally frivolous because Liberty Mutual is immune from the claims asserted by Petitioners. Tex. Lab. Code § 405.001(a); *Neitzke*, 490 U.S. at 327.

### B. Petitioners' appeal was frivolous.

As this was a workers' compensation case, Petitioner's prior two attempts at removal had failed and federal statute provides that review of an order of remand is barred, Petitioner's appeal of the third Order of Remand was frivolous because it had no basis in fact or in law. 28 U.S.C. §§ 1445(c) & 1447(d). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33, 112 S. Ct. 1728, 1733 (1992). (R. 525-531 & 595) Petitioners' Notice of Removal described claims arising out of fantastic or delusional scenarios and therefore were frivolous. *Neitzke*, 490 U.S. at 327. (R. 10-24)

## CONCLUSION

Respondent respectfully submits that, for the reasons set forth above, this Court has no jurisdiction to review this case on the merits or the issues presented by Petitioners and that the Court should affirm the Court of Appeals' Orders denying Petitioner's motions and granting Respondent costs and damages so that the case may return to the District Court for determination of that amount.

Respectfully submitted,

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